Nos. 93-517, 93-527, 93-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT; and BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,
Petitioners,

vs.

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF *AMICUS CURIAE* OF THE NEW YORK COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF THE NEW YORK COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The New York Committee for Public Education and Religious Liberty is an organization consisting of civic, educational, religious, labor and civil rights organizations and individual members. For many years it has engaged in and supported litigation opposing prayers, religious exercises and religious indoctrination in or in connection with public schools and opposing the use of public funds in or in connection with religious schools. In furtherance of its purposes, amicus has

instituted actions, financially supported the prosecution of others, appeared and submitted briefs as *amicus curiae* in still others, testified before legislative and administrative bodies, and engaged in educational programs. Some examples of cases in which amicus has been involved are *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Aguilar v. Felton*, 473 U.S. 492 (1985); *Parents' Ass'n v. Quinones*, 803 F.2d 1235 (2d Cir. 1985); and the instant case when it was before the New York Court of Appeals.

The following organizational members of amicus have expressly requested that they be listed in support of the brief being filed by amicus: American Ethical Union; Episcopal Diocese of Long Island, Commission on Social Concerns and Peace; League for Industrial Democracy; Monroe Citizens for Public Education and Religious Liberty; National Council of Jewish Women, New York Section; National Service Conference of American Ethical Union; New York Society for Ethical Culture; Public Education Association; Rochester Chapter of Americans United for Separation of Church and State; Rockland County Committee for Public Education and Religious Liberty; Union of American Hebrew Congregations; Women's City Club of New York; and Workmen's Circle.

In accordance with Rule 37 of the Rules of this Court, and pursuant to the stipulation between the parties, respondents' letter consenting to the filing of this brief is being filed concurrently with this brief.

INTRODUCTION AND STATEMENT OF THE CASE

Chapter 748 of the New York Laws of 1989 created the Kiryas Joel Village School District. The district's boundaries conform to the Kiryas Joel Village, a community of Satmar Hasidic Jews. Since the local school board members are elected from the district, all are adherents of the Satmar Hasidic faith.

The school district was created to provide for the special educational needs of the Village's handicapped children. Under Chapter 748 as implemented by the school district, the Village's handicapped children receive a publicly funded education in a school physically separate from the private religious schools attended by the other children of the Village.

The New York State School Boards Association and its president and executive director in their official and individual capacities filed suit against the New York State Education Department, the Commissioner of the Department, and others challenging the validity of Chapter 748 under the Establishment Clause of the First Amendment of the United States Constitution and other federal and state limitations. After allowing the two boards of education now listed as the sole petitioners to intervene as defendants, the state trial court granted plaintiffs' motion for summary judgment, finding that Chapter 748 violates the federal Establishment Clause and its New York constitutional counterpart. 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992). An intermediate appellate court held that the institutional plaintiff and the plaintiff officers in their official capacities lack standing. Finding, however, that the plaintiff officers have standing in their individual capacities, the court affirmed both the trial court's ruling and the federal and state constitutional grounds upon which it relied. 592 N.Y.S.2d 123 (N.Y. App. Div 1992). The New York Court of Appeals agreed with the courts below that the statute violates the federal Establishment Clause but declined to reach the state constitutional ground. 81 N.Y.2d 518, 618 N.E.2d 94 (1993).

This brief will argue that Chapter 748 violates the Establishment Clause of the First Amendment, applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Everson v. Board of Educ.*, 330 U.S. 1 (1947). Part I will discuss the applicable Supreme Court test for deciding the constitutionality of Chapter 748 under the Establishment Clause. Parts II-IV will demonstrate that Chapter 748 fails to

satisfy each of the three parts of the applicable test. Part V will maintain in conclusion that Chapter 748 is in obvious violation of the Establishment Clause and should be struck down.

ARGUMENT

I. THE APPLICABLE TEST

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court adopted a three-part test for deciding constitutionality under the Establishment Clause. The Court held that, to satisfy the Establishment Clause, a law must have "a secular legislative purpose," its "principal or primary effect must neither advance nor inhibit religion," and it must not "foster 'excessive government entanglement with religion.'" *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). The Court made clear that if any of the test's three prongs is not met, the law under review violates the Establishment Clause and should be struck down.

The Supreme Court has applied the test announced in *Lemon* in subsequent Establishment Clause cases except for *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Lee v. Weisman*, __ U.S. __, 112 S. Ct. 2649 (1992). The Court's grounds for not applying the test in *Marsh* and *Lee* do not cast doubt on the precedential force of the *Lemon* test for the case at hand. *Marsh* and *Lee* are readily distinguished.

In *Marsh* the Court rejected an Establishment Clause challenge to a state legislature's practice of opening its sessions with a prayer by a state-paid chaplain. In rejecting the challenge without expressly examining the practice's consistency with the *Lemon* test, the Court emphasized the "unique history," *Marsh*, *supra*, 463 U.S. at 791, of legislative prayer in the United States. Most notably, the practice has widely existed in this country since colonial times, and the Congress that proposed the First Amendment for state ratification explicitly authorized

the appointment of paid chaplains to open its sessions with prayer. *Id.* at 786-90. Based on this "unique history," the Court found it apparent that the framers of the First Amendment "saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 791. In essence, finding persuasive, specific evidence that the framers intended that legislative prayer be allowed, the Court felt no obligation to consider the practice's constitutionality under the *Lemon* test.

The case at hand involves state action of a sort that does not arguably have the type of "unique history" that the Court found so probative in *Marsh*. The creation of public school districts coterminous with religious enclaves is neither a time-honored tradition in the United States nor one that the framers of the Establishment Clause gave the slightest indication of approving. The Court's nonapplication of the *Lemon* test in *Marsh* is therefore not relevant precedent for nonapplication of the test to Chapter 748.

In *Lee v. Weisman, supra*, the Court held that the Establishment Clause bars clergy-offered prayers at public school graduations. In sustaining the Establishment Clause challenge without expressly considering whether such prayers meet the *Lemon* test, the Court explicitly declined to "accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*." *Lee, supra*, __ U.S. at __, 112 S. Ct. at 2655. In the Court's view, the practice under review so plainly begged for invalidation under the Establishment Clause that there was no need to examine its constitutionality under a test designed to handle more subtle problems:

> The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

Id.

Although some members of the Court at times have criticized the *Lemon* test as unduly restrictive of state prerogatives, a majority of the Court has continued to recognize both its basic wisdom and its superiority to proposed alternatives taking a substantially more relaxed view of Establishment Clause constraints. Respect for precedent strongly calls for application of the *Lemon* test in the case at hand. Moreover, as even those most skeptical of the test should be willing to concede, the instant case in any event hardly provides a logical occasion for seriously examining the merits of the test. As indicated by the analysis in Parts II-IV *infra* and as highlighted in Part V, the law at issue is so patently incompatible with the Establishment Clause that it, like the practice invalidated in *Lee*, fails to satisfy even the most basic conception of Establishment Clause constraints.

II. CHAPTER 748 LACKS THE REQUISITE SECULAR PURPOSE

The first prong of the *Lemon* test requires that a law have "a secular legislative purpose." *Lemon, supra*, 403 U.S. at 612. In applying this prong, courts should look to the legislature's actual motivation. *See, e.g., Wallace v. Jaffree*, 474 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980). They are not obliged to accept a particular secular purpose as real simply because the state asserts it. For a law to survive this prong, it must rest at least in part on "a clearly secular purpose," *Wallace v. Jaffree, supra*, 474 U.S. at 56, and its "pre-eminent purpose" must not be "plainly religious in nature," *Stone v. Graham, supra*, 449 U.S. at 41. Although the first prong's secular purpose requirement is not especially demanding, Chapter 748 fails to meet it.

According to the petitioners, Chapter 748 serves the secular purpose of providing special educational services to handicapped children currently not receiving such services. This statement of purpose, however, is conveniently incomplete. It fails to take account of two basic realities. First, the handicapped children of Kiryas Joel would have been receiving these services before the enactment of Chapter 748 but for their parents' refusal to allow them to be educated outside of Kiryas Joel. Chapter 748 was the culmination of years of controversy and litigation between Kiryas Joel and the Monroe-Woodbury Central School District of which it was a part -- controversy and litigation sparked by these parents' refusal to allow their children to avail themselves of these services by attending the Monroe-Woodbury public schools. *See Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 527 N.E.2d 767 (1988).

Second, although framed in terms of concern for the emotional and psychological well-being of the Village's handicapped children, this refusal was intimately related to certain religiously based preferences. According to the petitioners, the children's cloistered and culturally distinctive existence to date in Kiryas Joel places them at high risk of emotional and psychological trauma from contact with children of other backgrounds. The children's cloistered and culturally distinctive existence, however, is hardly an accident. It is the direct result of their parents' decision to isolate them from non-Satmar children in order to avoid exposure to influences that might weaken their commitment to the Satmar Hasidic faith. *See generally* Allan L. Nadler, *Piety and Politics: The Case of the Satmar Rebbe*, JUDAISM, Spring 1982, at 135.

In short, the purpose of Chapter 748 cannot reasonably be understood as one of simply providing special educational services to handicapped children currently without such services. Rather, it must be understood as one of providing these services in a manner that conforms to the religiously based preferences

of parents sharing the Satmar Hasidic faith. So understood, the purpose fails to supply the secular justification needed to satisfy the first prong of the *Lemon* test.

Justice O'Connor has forcefully argued that, though not religiously neutral, a purpose of lifting a substantial state-imposed burden on free exercise should be regarded as "secular" within the meaning of the *Lemon* test. *See Wallace v. Jaffree*, *supra*, 474 U.S. at 81-83 (O'Connor, J., concurring). The state's purpose in the instant case, however, plainly fails to meet this description. Here, as in the prior litigation with the Monroe-Woodbury Central School District, the parents "insisted that, as a class, they should be exempted from public school placements only for *nonreligious* reasons -- most particularly because of the emotional impact on the children of traveling out of Kiryas Joel." *Board of Educ. v. Wieder*, *supra*, 72 N.Y.2d at 189, 527 N.E.2d at 775 (emphasis in the original). As then-Judge, now-Chief Judge, Kaye wrote for a unanimous court in that earlier litigation, having "made no showing that any sincere religious beliefs were threatened" by the public school placements, the parents have provided "no basis" for a judicial finding of a substantial state-imposed burden on free exercise rights. *Id.*

Chapter 748 lacks the secular purpose required by the first prong of the *Lemon* test. It therefore violates the Establishment Clause and should be struck down.

III. CHAPTER 748 HAS THE PRINCIPAL OR PRIMARY EFFECT OF ADVANCING RELIGION

Under the second prong of the *Lemon* test, a law is unconstitutional unless its "principal or primary effect . . . neither advances nor inhibits religion." *Lemon*, *supra*, 403 U.S. at 612. The Court clarified this prong of the test in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). The Court in *Nyquist* explained that the reference to "principal or

primary" should not be taken literally. In applying the second prong, courts are not expected to engage in "metaphysical judgments" as to whether a particular effect is actually the law's principal or primary one. *See id.* at 783-84 n.39. Rather, they should try to ascertain whether the law has an effect of advancing or inhibiting religion that is "direct and substantial" as opposed to "remote and incidental." *See id.* Effects of the former variety are forbidden by the Establishment Clause, and laws having such effects should be struck down. *See generally* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 917-23 (1987) (discussing "principal or primary effect," as used in the second prong).

Even if the analysis in Part II *supra* fails to persuade this Court that Chapter 748 is so lacking in secular purpose as to fail the relatively lenient first prong, it at a minimum should convince the Court that Chapter 748 is based in substantial part on a nonsecular purpose so apparent that Chapter 748 necessarily has the type of "direct and substantial" effect of advancing religion prohibited by the second prong. Very simply, given the statute's obvious purpose of providing services in a way that conforms to the religiously based preferences of parents sharing the Satmar Hasidic faith, it virtually cannot help but be perceived by adherents and nonadherents of the faith alike as state sponsorship of religion -- one of the "three main evils" that the Establishment Clause was intended to avoid. *See Lemon*, *supra*, 403 U.S. at 612 (identifying these evils as "sponsorship, financial support, and active involvement of the sovereign in religious activity"). Time and again, the Court has emphasized that an effect of endorsing a particular religion or religious belief is antithetical to the clause. *See, e.g., Allegheny County v. ACLU*, 492 U.S. 573, 592-94 (1989); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 389-90 (1985); *Engel v. Vitale*, 370 U.S. 421, 436 (1962). As Justice O'Connor explained in a discussion of endorsement later cited approvingly

by a majority of the Court, *see Allegheny County*, *supra*, 492 U.S. at 593-94, government endorsement of religion is so objectionable because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

The fact that this endorsement occurs in the context of providing educational services for the young compounds its constitutional difficulties. As the Court underlined in the course of finding that certain state programs for nonpublic school children violated the second prong of the *Lemon* test:

> The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

Grand Rapids, *supra*, 473 U.S. at 390 (citations omitted).

In the case at hand, the children of Kiryas Joel are imbued with a feeling that "they are insiders, favored members of the political community," *Lynch*, *supra*, 465 U.S. at 688 (O'Connor, J., concurring), while the children of the Monroe-Woodbury schools -- the children that Chapter 748 enables the Kiryas Joel children to avoid -- are imbued with the feeling that "they are outsiders, not full members of the political community," *id.* Although the needs of the handicapped children of Kiryas Joel may be the focal point of this dispute, the sensitivities of the children in the Monroe-Woodbury Central School District cannot reasonably or constitutionally be ignored.

If there were overwhelming, or at least strong, evidence that attending the Monroe-Woodbury public schools was likely to

harm the Kiryas Joel children in the ways that petitioners claim, it perhaps might be tempting to view Chapter 748's effect of endorsing religion as "indirect" or "incidental" and therefore not prohibited by the second prong. *See Nyquist*, *supra*, 413 U.S. at 783-84 n.39. The evidence presented in support of the claim of imminent psychological and emotional harm is hardly strong, however. Virtually nonexistent would be a more apt description. Indeed, not only is this claim essentially based on no more than conjecture and bald assertion; there is also reason to doubt that it is made in good faith. The unanimous federal appellate opinion in *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), offers a perspective on the Satmar Hasidim's insistence on keeping their children apart from public school children that belies their contention here that they are motivated by concern for their children's psychological and emotional well-being. Addressing an Establishment Clause challenge to a New York City educational plan designed to satisfy demands by Satmar Hasidim for separate services for their children, the Court identified a much less sympathetic motivating force for the Satmar Hasidim's insistence on separation -- rank dislike of, and prejudice against, anyone outside their faith:

> They are reported [in various newspaper articles submitted in evidence] as seeing Hispanics as "different" and "not a good influence on [the Hasidic] girls," and as believing that educating Hasidic children in the company of Hispanic children would "corrupt[]" the Hasidic children. The lengths to which the City has gone to cater to these religious views, which are inherently divisive, are plainly likely to be perceived, by the Hasidim and others, as governmental support for the separatist tenets of the Hasidic faith. Worse still, to impressionable young minds, the City's Plan may appear to endorse not only separatism, but the derogatory rationale for separatism expressed by some of the Hasidim.

Id. at 1241.

In sum, realism requires the recognition that the state's adoption of Chapter 748 strongly communicates state endorsement of the Satmar Hasidim's religiously based preference for separatism. Moreover, as the Second Circuit warned in *Parents' Ass'n of P.S. 16* (*see id.* at 1241), "[w]orse still, to impressionable young minds," the statute may appear to endorse "not only separatism, but the derogatory rationale for separatism" that some Satmar Hasidim have publicly offered in the past. The "symbolic union of government and religion," *see Grand Rapids*, *supra*, 473 U.S. at 392, effected by Chapter 748 mandates invalidation of Chapter 748 under the *Lemon* test's second prong.

IV. CHAPTER 748 FOSTERS EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

The third and final prong of the *Lemon* test requires that a statute "not foster 'an excessive government entanglement with religion.'" *Lemon*, *supra*, 403 U.S. at 613 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The Court in *Lemon* clarified the nature of this prohibition when it invalidated under the third prong a state law funding salary supplements for teachers of secular subjects in parochial schools. The Court perceived a serious danger that the teachers would misuse the aid by injecting religion into their teaching of secular subjects, because "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." *Lemon*, *supra*, 403 U.S. at 618. The Court then reasoned that to ensure that the aid did not support any teaching of religion, the state would have to undertake "comprehensive, discriminating, and continuing state surveillance" of the teachers receiving the aid. *Id* at 619.

According to the Court, however, these essential "prophylactic contacts" were unacceptable under the Establishment Clause, because they "involve[d] excessive and enduring entanglement between state and church." *Id.*

Three subsequent applications of the third prong are particularly relevant to the case at hand. All three involve the use of publicly employed teachers to provide parochial school students with remedial instruction or other special educational services of a secular nature. In the two cases in which the services were furnished on parochial school premises, the Court invalidated the programs under the third prong. *See Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975). According to the Court in *Meek*:

> The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. *Cf. Lemon v. Kurtzman*, 403 U.S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. *See id.*, at 618-19....

Meek, *supra*, 421 U.S. at 371. To similar effect, *see Aguilar*, *supra*, 473 U.S. at 412 ("The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. . . . [T]he aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message.").

In the one case in which the services were furnished off parochial school premises -- in public schools, public centers, or mobile units -- the Court found no violation of the third prong. *Wolman v. Walter*, 433 U.S. 229, 244-48 (1977). According to the Court in *Wolman*, the danger that a publicly employed teacher might inject religion into his instruction existed in *Meek* "because the pressures of the environment might alter his behavior from its normal course. So long as these types of services are offered at truly religiously neutral locations, the danger perceived in *Meek* does not arise." *Id.* at 247.

On the surface, the furnishing of instruction to handicapped children in the Kiryas Joel public school may appear to resemble most closely the situation in *Wolman* and therefore to hold no more potential for fostering entanglement than the Court found acceptable in *Wolman*. As in *Wolman*, a religiously homogeneous group of students is receiving purportedly secular instruction at an ostensibly "neutral" site. The handicapped children of the Village are being taught in a public building by publicly employed teachers selected without regard to religious beliefs, and the entire program is under the auspices of a secular superintendent.

Upon closer examination of the realities of the Kiryas Joel public school, however, the analogy to *Wolman* loses its force. Certain salient facts about the school indicate the school's much closer affinity to the parochial schools in *Lemon*, *Meek*, and *Aguilar* than the neutral sites in *Wolman*. Most notably, the school is located in a "pervasively sectarian" village, a religious enclave in which virtually every aspect of the villagers' daily life is governed by the precepts of their Satmar Hasidic faith. In addition, although the superintendent and teachers may not be Satmar Hasidim, every member of the school board is. When these additional facts are taken into account, it becomes obvious that the only way in which genuinely religiously neutral teaching possibly could be ensured is by the "comprehensive, discriminating, and continuing state surveillance" that the *Lemon*

Court found prohibited by the third prong. Chapter 748 fares no better under the third prong of the *Lemon* test than it fares under the first two.

V. CONCLUSION

For the reasons set forth in Parts II-IV *supra*, Chapter 748 fails to satisfy all three parts of the *Lemon* test. Although a statute's failure to meet any one part of the test requires its invalidation under the Establishment Clause, the fact that Chapter 748 does not meet all three parts is not without significance. It underlines how closely this statute strikes at the heart of the Establishment Clause and the values it represents.

Writing for the Court in *Lee v. Weisman*, *supra*, Justice Kennedy cited as a "fundamental" and "central" principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." __ U.S. at __ , 112 S. Ct. at 2655. Finding this constitutional "minimum" violated by the practice of clergy-offered graduation prayers, Justice Kennedy dispensed in *Lee* with application of the *Lemon* test, a test attuned to detecting less blatant violations of the clause. As suggested by Chapter 748's three-fold violation of the *Lemon* test, it too so blatantly violates the Establishment Clause that it fails to satisfy even obvious constitutional minimums. Unlike the practice under review in *Lee*, Chapter 748 does not coerce anyone to "participate in religion or its exercise." *See id.* By using tax-raised funds to sponsor and advance the Satmar Hasidic faith, however, Chapter 748 does coerce the people of New York State to "support . . . religion or its exercise." *See id.* Indeed, on an even more basic level, Chapter 748 can reasonably be seen as not simply a law "respecting" -- that is, tending to lead to -- "an establishment of religion" (*see* U.S. Const. amend. I), but instead as a law actually creating such an establishment. By forming a school district with

boundaries coterminous with a religious enclave, the statute essentially creates a governmental unit with an official religion.

Application of the *Lemon* test thus confirms what should be apparent from the most basic understanding of Establishment Clause principles: that Chapter 748 is fundamentally at odds with the clause and should be struck down.

DATED: February 18, 1994

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